92-442

Supreme Court, U.S.
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No...

IN THE

SUPREME COURT

of the

UNITED STATES OF AMERICA

March term 1992

DOUGLAS J. MICHELSON,

petitioner,

vs

COMMISSIONER OF INTERNAL REVENUE,

respondent,

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Tenth Circuit

Petition For Writ Of Certiorari

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QUESTIONS PRESENTED

(1.)If there was error in the Court of Appeals in not reviewing the legal issues raised? If a proper standard of review of those issues was used?

(2.) Was there a fair trial and procedure in the Tax Court?

(3.) Was Michelson's constitutional right to engage in the metal business as a dealer in metals respected? Does Michelson's intention and effort and the legal instruments and contracts at the time of entering the business, control the tax consequences of the undertaking? Once Michelson entered the metal business, purchased his inventory, signed documents, made his IRS elections, can IRS choose to not honor them?

(4.)Was a proper application of section 108 of the Tax Reform Act of 1984

had, where no losses are allowed in the year of disposal?

(5.) Was Arkansas Best v CIR, a tax case involving securities, misapplied to the instant case here where metal inventories of one million dollars are seen, and there are no securities? –

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Standard Industrial Classification (SIC) 5051, a metal dealer.

OPINIONS BELOW

The 10th circuit Court of Appeals would not consider the legal errors of the TAX Court on the merits. They refused to reconsider from the malpractice of prior counsel, points preserved in the trial in the lower court, errors showing misprison sufficient for mistrial. It did not address numerous legal issues seen in the brief in chief for reconsideration. It is a gross injustice. It is seen in the appendix as a ruling on facts, and then a procedural ruling on a motion to reconsider. The brief in chief on reconsideration is included to facilitate understanding which issues were raised.

The Tax Court opinion is wrong legally. It is wrong on the evidence, and not supported by a preponderance of the evidence. It is wrong on the procedure,

which it turns into manipulation and abuse. It is wrong on the spirit. It is wrong on the law. The Tax Court Judge addresses much with no basis of evidence, and does not follow proper case law precedent. She manipulates around what is binding on her, to inflict injustice on petitioner.No proper ruling were given. It is seen in the appendix as a TC Memorandum opinion and ruling denying reconsideration.

JURISDICTION

The appellate order denying the motion to reconsider was entered March 25 ,1992.The Jurisdiction of the Court is invoked under 28 USC 1254. The opinion of the Court of Appeals does not follow Supreme Court precedent. It did not provide adequate review. It is a gross miscarriage of justice. It does not

address any legal issue on the merits. It does not correct Tax Court error. It does not address an improper trial.

In the lower court jurisdiction was based on 26 USC 7482.

STATEMENT OF THE CASE

Douglas Michelson, petitioner (hereinafter Michelson) entered his business in 1978 after 15 years of experience in buying and selling metal. He purchased over several months an inventory of metals totaling by end of 1978, exactly $940,377. He financed part of this with a revolving inventory loan from his local bank, secured by a hedging agreement and assignment of hedging account at Merrill Lynch. Michelson maintained a trade account at Merrill Lynch and EF Hutton to buy and sell metal from his inventory. He undertook hedging

contracts for the purchase and sale of metal necessary to his business operations. Michelson took delivery and made delivery of metal as is the custom of a dealer in metals. He represented himself as a dealer. He operated from a commercial office building. He worked at it at least eight hours a day. He did everything necessary to establish the business in a clear legal fashion. He employed tax and accounting experts Peat Marwick Mitchell which advised that until he sold his first metal he need not report on schedule c. Thus 1978 was not reported on schedule c, even though certain things were done in that year to establish the business.

Because of the sale of metal from his inventory, by March 1979, it was necessary for Michelson to report to IRS as a metal dealer on schedule c. He made

delivery from his warehouse stock of metal, $460,050 of copper in 25 or so transactions. He had about $600,000 in metal in inventory after his deliveries. He had contracts for delivery of metal over the next year totaling over $300,000. His business was his main source of income.

The Tax Court says the issue is whether losses sustained by petitioner were capital or ordinary. This is merely pretext to taking away petitioners rights to engage in the business which he established, and sets the stage for shocking abuse by the Tax Court. IRS did not contend until 1984, that he was not operating the business of a metal dealer. In fact they had done everything opposite in treating him. They had issued him a small business tax ID number which he

used to report employees withholding taxes.

Petitioner contends in his own testimony and is supported by expert testimony, as well as his brokers, his bankers, and his associates testimony, that his intention and actions in establishing his business is what will control the tax consequences, no matter the profit or loss or further problems of the business. His business cannot be just "taken away" by unsupported words spoken twelve years later that he was not a dealer. He did not need to incorporate. The good faith entry into the business does not go away just because a business aberration comes about and causes severe losses to the business in its first year. Many business do not survive their first year. And yet the business losses are clearly recognized in that year.

No other case shows the broad and clear trail of legal documents and other evidence pointing to its establishment as a business enterprize, a dealer in metals. The Court of Appeals failed to review them, or trust to their having been interpreted properly by the USDC of NM in its 1982 judgment finding Michelson a dealer in-metals. The only case with similar hedging documents is Monfort v CIR.(1977) ca 10, 561 f2d 190 which the court should have followed.

Later that year,in August 1979, Nelson Bunker Hunt, and other racketeers ran a corner in the silver market. A corner is a predatory devise to gain control on the market and destroy competition. Michelson business was subject to such damage.

Michelson deposited $1.2 million in his account meeting margin calls for

security for performance on the contracts. In December 1979, believing there was no silver available in the market, he switched out of certain contracts, into a later delivery date. These are called switches for a dealer or straddles. These transactions under normal accounting principles gives rise to a tax consequence. It is treated as hedging expense, and adjust costs of goods sold in the year of disposition. Michelson and most other dealers did this type of thing, in their effort to deal with the corner. Some $304,895 in hedging losses were incurred in switching out, and they entered his costs of goods sold for the year of disposition, 1979. Weiler v Cir 187 f2d 744.

IRS in a task force effort to get people dealing in the commodity market using straddles, erroneously swept up

Michelson business with the same broom. It wrongly denied proper treatment of all his losses. Gregory v. Helvering 1935, 293 US 465, 55 s ct 2??, 6 led 596.

IRS does not go through hundreds of other profitable transactions to analyze their purpose and see "if they were closed" in the year of disposition. In fact they lie saying that only losses existed.

If the Court of Appeals had addressed point 12 in reconsideration brief, they would have realized that one year at a time shows the sequence of effort Michelson made going into this metal business. (see point 1 R. brief). This is the proper criteria to judge by and the court of appeals should have reviewed the criteria the Judge used under a law standard.

Why does IRS confuse things with more than one year treated at a time? Why do they not accept 1979 business as filed? IRS wants to make it seem as if there is something more than the normal operations a small business injured by anti-trust misprison. There is not.

In sum, Michelson purchased metal for his business, sold metal from his inventory, and spent his full time in the occupation of a metal dealer. Unfortunate for him, illegal circumstances came along which turned his profit into a loss, and almost destroyed his business.

Since there is nothing in the above shown by the evidence to be wrong, and nothing showing the transactions to be capital in nature, IRS must accept that version of the truth. They must take things as they find them, in the sequence in which they occurred, with judgment

proper to making a proper 1979 tax return as viewed at that moment.

Since Michelson was a dealer in metals all during 1979, and he continued the business during 1980, he must again report results on schedule c. That is consistent accounting. That is what he did. He had sales of metal of $ 733,335 for 1980. In January 1980, Michelson switched other contracts to more distant delivery dates, as he had done in late 1979. Later that month he was sold out by his broker for lack of margin. All the contracts were closed. All other dealers with contracts closed in the corner treated them in the ordinary course of their business as herein. Michelson continued on his business making further deliveries of metal in May. He paid off his bank loan. Most of his time was then devoted to the Merrill Lynch litigation.

Merrill Lynch sued Michelson in an effort to collect. USDC NM ruled in 1982 that the transactions were closed and the account as stated and balance owed Merrill Lynch was correct and due them. The court dismissed his counterclaims, after dealing with several of them. One they analyzed was whether under 4c of the CEA the transactions were bonafide, and closed. They were found to have been executed properly and on the exchange floor. Merrill Lynch collected selling off Michelson's remaining inventories.

IRS makes up its version of "not closed transactions" two years after the court said they were closed. IRS makes up its prospect of recovery issue two years after the court had ruled for Merrill Lynch, and the Appeals court had affirmed, on the only law suit existing in 1980.

The 1980 hedging losses incurred in Michelson's business were clearly part of costs of goods for 1980. He incurred $1,303,977 in the ordinary course of his business in dealing with the corner. They were closed transactions in 1980. This was established by expert accounting and exchange market testimony. This was established by the 1982 USDC of NM court order and decision.

IRS will not accept Michelson's business as it finds it done according to generally accepted accounting principles. So it decides in 1984 for 1980, there are two more rules it wants to apply. These applications are improper because the transactions are fully and properly treated in the ordinary course. These applications are wrong because they are only applied to tax abuse situations created by the taxpayer, and that is not

shown to exist here. These applications are arbitrary and not applied equally to other dealers in the business. These applications were plead in the alternate, having succeeded on the primary, consideration of the alternate is improper. IRS arbitrarily disallows $1,034,929, claiming they were "not closed transaction". Again only losses are treated. They claim there was the prospect of recovery on them when it was filed. Michelson's CPA swore they were correctly treated as hedging losses, in the ordinary course of business and cannot be double treated as a casualty loss. <u>They do not bear any indica of a casualty loss under 165.</u> IRS says(yet offers no expert on it) that even if they were not disallowed that way, they would not be hedges, because he had no silver in inventory. Michelson had part

of them in inventory, the gold part, and according to his experts testimony the remainder were anticipatory hedges correct per the CFTC regulations and laws. Judge Parker ignores such key testimony and makes up her own logic, i.e. that a contract to deliver silver, requires you have silver?? This does not follow contract law, nor use of the exchange. The particulars of partial being in inventory, made no difference to IRS, the Tax Court Judge or did the Appeals Court even review it. They merely go about disallowing losses which has the effect of increasing income, and applying the ratchet of penalties and interest to browbeat petitioner to give in from fear.

Michelson's business was correctly categorized in 1979 or 1980 by the Department of Labor as a dealer in

metals; Standard Industrial Classification 5051. IRS ignores the estopple effect on the government from this, as they ignore their own small business classification estopple. Again, estopple was proper and would not be applied.

In 1985, Michelson moves the court to take judicial notice(FRE mandatory 201d) of the fact that the USDC of NM in 1982 ruled he was a dealer in metals. The court manipulates and will not rule on his motion. That is not due process. Similar procedure was followed by other judges, after en banc decision on Congressional review of IRS action on commodity exchange contracts. see King v Cir tax cch 43,520. Finally there is a trial in 1986. For six months after the pretrial order, IRS stonewalls Michelson and will not stipulate. They will not

respond to discovery and hold fast to their wrong position. Finally the trial comes.

In 1986, the IRS and the Judge make a farce out of the trial. Dumping numerous motions back on him, so they do not appear in the record. They proceed to omit and submit what IRS wants. She denies the existence of the motion for judicial notice and rules against admitting the order, for reasons her and IRS counsel make up.

While allowing Dr. Teweles to testify as an expert, Tax Court Judge Parker in the end treats him as if he had not testified. She makes up his mind for him. The same with a law and tax expert Mr. Marron. She makes him out as a $29 clerk, just having prepared the return on misinformation from Michelson. Yet that is not how he was qualified to testify.

He was an expert. He testified to his opinion that Michelson was a metal dealer, and the Court of Appeals should have reviewed.

The attorney at trial, is not allowed to cross examine or examine the IRS on the notice, or their experience or expertise, or any judgments they made. It is all taken as conclusive, which she wrongly explains to the record as not going behind the notice. That does not comply with the FRE. That is not due process. The Court of Appeals does not even address such an egregious error seen tainting the whole trial and the creditability of IRS versions seen in the notice. No weighing of the evidence against such a tainted background is seen at the Court of Appeals, although if it had addressed the legal issues raised in the reconsideration brief it would have

had to address such under a legal standard of review.

Things were very bad at trial in 1986. That is not the end of the errors. The manipulations go on. The tax court then will not rule after trial and briefing. In yet another manipulation around the required ruling per the Supreme court precedent Corn Products Refining co v CIR, 1955, 350 US 46, 76 s ct 20 ,110 led 29., and the en banc tax court precedent Miller Gilbert, just decided, the Tax Court Judge abuses Michelson by not ruling. Nothing Michelson does to get a proper judgment rendered on the trial gets a response. Such an egregious manipulation around the required precedent and sleeping on a claim four years to increase the interest and penalties is wrong. In equity, the doctrine of laches would clearly hold

that IRS has slept too long on their claim and it was lost. Any courts must say it was a failure to prosecute.

Finally in 1990 Michelson's 1983 antitrust lawsuit is dismissed with prejudice. Since this is the factual common result of most lawsuits, it is nonsense to hold that there was a prospect of a recovery from a lawsuit, and await that. The case is placed with a tax attorney and CPA who promises to leave no rock unturned on appeal. He malpracticed. It is felt that the IRS attorney and his attorney agreed to throw away his appeal. It is clear it is malpractice, in not addressing trial errors, and legal errors. His withdrawal came after a year of MIchelson demanding that he address the legal issues, and the trial issues. The Court of Appeals moves on from something he filed, and then will

not reconsider, all unbeknownst to Michelson. This was manifest lack of due process.

(1.)IF IRS _ HAS AUTHORITY TO DETERMINE IF MICHELSON WAS A METAL DEALER?

The lower court determination that Michelson was not a metal dealer is an excessive application of the statute. see Traux v. Rarch 239 US 33, 36 s ct. 7, 60 led 131 (1915) Michelson has the right to be a metal merchant. The Appellate Court did not properly address the right of Michelson to do a common occupation of the community. The issue was properly

raised. Issues on appeal were not addressed under a proper standard of review. Kotteakos v US 328 US 750, 66 s ct.1239, 90 led 1557 (1946)

At trial, the Tax Court took judicial notice of the Commodity Exchange Act. Therein the purpose and functions of the exchanges is clearly to buy and sell commodities in interstate commerce. Michelson says he was buying and selling metal on a exchange market as a dealer. The Tax Court ignores conclusive evidence and makes up otherwise. It says he was gambling. The appeals court in error did not enforce the conclusive evidence, over the conjecture which was clearly erroneous.

IRS in issuing Michelson a small business number for a sole proprietor and metal business is estopped from claiming otherwise. Additionally, IRS admits in

their answer to the complaint in the Tax Court that he is in business, and kept proper LIFO inventory records, made other elections proper to a business and employed a CPA to keep proper records. The Appellate Court failed to hold the Tax Court to the standard of conclusiveness seen in an admission. Auto Owners inc v. 667 f2d 714, 8th cir (1981) The above were legal issues needing addressing and raised in the reconsideration brief. The Court of Appeals did not address anything in the reconsideration (brief in chief).

The Department of Labor categorized Michelson's business, as Standard Industrial Classification (SIC) 5051, a metal dealer. He listed his occupation as that of a metal dealer on his 1979, 1980 and 1981 return. The Tax Court was

required by judicial estopple to treat Michelson consistent: as a metal dealer.

Tax Court Judge was required by collateral estopple to rely upon the USDC of NM interpretation of the legal documents, and resultant finding that he was a dealer in metals. Legal documents showing his trade was a metal dealer, were not given proper interpretation by the Tax Court or enforced by the review. cf. Edwards v CIR 415 f2d 578, 582, (1969) Nor is review under a clearly erroneous standard correct. A legal standard in which the Court of Appeals reviews the written legal document and draws its own conclusions is correct. (see point 6 reconsid) Any document is persuasive evidence of the fact and legal conclusion Michelson was a metal dealer and conducted his business as a sole proprietorship.

Michelson was totally at risk for the contracts undertaken, loans, etc., as a sole proprietor. (see point 8 of brief on reconsideration.) A Peat Marwick Mitchel KMPG, tax law expert testified to his risk as a sole proprietorship. It was one thing he used in forming his expert judgment that Michelson was a metal dealer, not an investor. This Harvard tax lawyer and CPA used the confidential relationship of 15 years to apply the statutes, and 1979 case law, and to judge the correct category of business expenses, and sales income, and costs of goods sold treatment.

Dr.Teweles, an exchange market expert of national reknown testified that Michelson transactions were proper hedges under the Commodity Exchange Act and that he was a metal dealer, relying on numerous criteria in his judgment

sufficient to arrive at the expert opinion. He referenced a college text, he authored on hedging and other controlling material, such as trade practice. He further testified that any problems Michelson experienced came from a corner in the silver market and its impact on businesses in that sector of the economy. Absent the corner there is no reason Michelson would not have completed the contracts by delivering metal and made a good profit. Shad v. Dean Witter Reynolds 799 f2d 525, 9th cir (1986). Judge Parker misruled under FRE 702, and otherwise in her treatment of expert testimony. She errored in imposing her view on what he needed to make his expert judgment. Such an error was not harmless. re Japanese Products Litigation 723 f2d 238, 3rd cir 1983. She has made so many errors about the

business of petitioner in her opinion as the be unbelievable. She repeatedly refers to securities analogies and market which are not the same as where they sell metal.

It has been conceded by IRS that Michelson's income tax return for the years in question is correct reporting as a metal dealer according to the law and standard accounting practice for that trade. What is the problem? They assert but do not offer any evidence or rebut evidence offered, that he is not a metal dealer. Instead they contend thru Judge Parker, that what ever he does, or did in 1979 was not enough. She ignored any proper criteria referenced in case law for enough, and the Court of Appeals did not hold her to it, Faulconer v CIR 748 f2d 890, 895, 4th cir. and (1984)

Nickerson v Cir 700 f2d 402.,or review criteria which is a question of law.

It certainly is not the evidence adduced that drove the aberrant facts and conclusions seen in the TAX Court opinion. There were no expert witnesses for the government.

Did petitioner's evidence overcome the presumption of the notice? Here again the Appellate Court did not apply the right standard of review of that legal question. Correctly, the Appellate Court should have investigated what is minimally needed by the person with the burden to overcome the "negative" conclusion seen in the notice. Weinstein, a very competent authority, deals with that problem suggesting a minimal standard and a bubble bursting theory. Introduction of any evidence shifted the burden back to IRS. His

testimony alone was sufficient to shift the burden back. And no expert contradiction should have resulted in judgment for Michelson. (see point 9 reconsideration)

Other indistinguishable cases are dismissed. King v CIR cch 42,520. Why King and not Michelson? The Judge is why. The personal view of the Judge, not the law.

IRS gave no recognition to the losses having arisen from the racketeering activity of the corner in the silver market damaging taxpayers business. Again the Tax Court Judge ignores what she judicially noticed, (The Rosenthal, Congressional Committee report) that cornering, and artificial price caused the losses. IRS in its answer had admitted that business were damaged. A judgment of the USDC for SDNY,

Minpeco v Hunt,etal decided the artificial price was against the anti-trust laws on cornering, and under RICO was "racketeering". In spite she decides instead it is all unclear. Michelson was a investor. He had losses because he gambled. Again the Court of Appeals must hold her to the conclusive evidence which show that the losses arose from Michelson trying to deal with a manipulated market. Weiler.v CIR 187 f2d 744.

For IRS, section 165 is their secret weapon. It is nothing but used as an selective enforcement abuse statute. There were billions in anti-trust suits filed and not one other 1979 taxpayer, to this persons knowledge is having their damages disallowed because there is the possibility of recovery from a lawsuit. Why is not Eastman Kodak or Englehard Industries, or Pennzoil or thousands of

others not treated like this? Because it is so ludicrous they would be laughed out of court. There were over $600 million dollars alone in anti-trust suits filed over the corner in the silver market. Were they all disallowed by IRS? No. Only Michelson was! There were ten of thousands of persons involved in the class action in the silver market. Did IRS disallow each of their transactions as not closed? No, only Michelson was.

Internally inconsistent and a telltale, is the fact that IRS did not declare any profitable transaction "not closed". If one transactions was closed upon disposition, all were.

Important to the point is competent legal advise was given that any recovery would be taxed in the year, when and if, recovered. This is the most common advise given by attorneys to litigants when they

discuss damages. It is the way IRS treats most taxpayers. Clearly there should not be two tax times or one so unclear as to tax a "prospect". Certainly not one which chills enforcement. Why , if not abuse, is Michelson treated different? Judge Parker lacking any evidence to point to, misrules, that no evidence to the contrary was introduced. Michelson testified he had expert advise it would be taxed when recovered. And misuses that "he said" at an IRS meeting cloaked in privilege under FRE 408, " he would win his suit" This is no more than the forced confessions of Torquemado's days. (This was covered in point 11 briefed on reconsideration.)

Congress makes it effort to preserve the market and stop the abuse of IRS on small dealers. CEA section 21, (investigating the corner) and section

108 of Tax Reform Act of 1984.(declaring commodity exchange transactions closed in the year of disposition)

The IRS agent was not an expert or offered as one of special expertise in exchange market or by education. Yet he prepared the notice, saying e.g. "that they were not hedges." Compared to Dr. Teweles, education ,experience and expertise, this man is a layman. It makes a laugh of the FRE 702 on expert testimony. Agent Carter was just doing what he was told to get those silver tax abusers. He was not required to introduce his notice exhibit. The court said taxpayer would identify it. It is improper to allow that as the evidence,or the procedure to admit evidence, if that is where the Tax Court evidence came from. The Tax Court is full of misleading and deceitful statements about

the notice. The findings are all made up from attorney conjecture. There is no substantial evidence of the IRS case and on review the Appellate Court misses that point, and affirms.

The Appellate Court was required to address the legal question if there was a preponderance of the evidence in support of the judgment and did not...This Appellate review takes the trial standard of a preponderance of the evidence, and instead makes it a scintilla of evidence is all thats needed.

The Court of Appeals did not address the higher Federal policy which would bind the IRS and Tax Court, i.e. that declarations of non business status is opposite the free enterprise system, and Constitutional rights of taxpayer. Tax Court was incompetent to ignore a market niche which Congress set up in its

commodity exchange market scheme. Tax Court ignored at its peril the testimony of a reknown expert, DR. Teweles, who testified that Michelson was a metal dealer and his hedging transactions followed the CFTC regulations. Dept. of Labor said he was a metal dealer. He was on an exchange list of dealers.

(2.)WHETHER SECTION 108 (26 usca 1092) WAS CORRECTLY APPLIED?

The plain words of the statute convey Congressional intent of the tax law for the year in which the return is filed, (1979). AND IT WAS NOT FOLLOWED. Because there is split between circuits in applying section 108, this court must resolve it.

Five, switches or straddles are closed in 1979. These are the hedging losses Michelson incurred in trying to deal with a manipulated market. Five more are seen in 1980 incurred in trying to deal with the corner.

Congress in sec. 108 of the Tax Reform act of 1984 when it addressed this particular area of the law in regards to commodity futures contracts being closed transactions, and the status of dealers, specifically worded the statute so that it was clear to those transactions prior to 1982. That concerns us here. The Tax Court must follow the literal word of the statute.

(a)General Rule--For purpose of the Internal Code of 1954, in the case of any disposition of one or more positions -- (1) which were entered into before 1982 and form part of a straddle, and (2.) to which the amendments made by title V of the Economic Recovery Tax Act of 1981 do not apply, any loss from the disposition shall be allowed for the taxable year of

the disposition if such position is part of a transaction entered into for profit. (b) Presumption that transaction entered into for profit--For purposes of subsection (a) any position held by a commodities dealer or any person regularly engaged in investing in regulated futures contracts shall be rebuttably presumed to be part of a transaction entered into for profit. (Tax Reform Act of 1984, publ l 98-369, sec 108, 98 stat 630).

Treatment of commodity exchange contract losses "before 1982" were continuing to be allowed "for the taxable year of the disposition". That is the plain language of the statute and what taxpayer can expect to happen. Judge Parker was aware of the binding precedent set by the Court en banc hearing in --- Miller, Gilbert v CIR 1985, 84 TC 55 and inarguably of the effect herein. Much of her trial error and effort was to obscure the precedent, and affect. This court must reverse such manipulation. She did not rule on the law after judgment

because it was unfavorable to her view. - CIR v Textile Mill, CA3, 1944,117 f2d 62, affirmed 62 s ct. 272, 314 US 326, 86 led 249 She made Michelson into one of those dealers she felt she could deny fair treatment. She moves forward on her own and IRS's sub agenda. (What'll we do now, after **Miller, Gilbert?)**

Congress was clearly aware that there had been some abuses in the use of "silver tax straddles" in years prior to 1982 and addressed them knowing that the IRS cases then before the Tax Court would be effected if the CONGRESS chose to so effect them. It did.(see p842 **Miller, Gilbert** supra) It is important that the Supreme Court give effect to Congress' wish to rein in IRS abuse.

This is important to this case because it was started off from the dragnet operations of the IRS against

anyone who dealt in the silver market. There is practiced deceit by the judge about the notice and its admission into evidence , and weight and presumption of it (t-3,25,1002 ,1004)) and her disallowing of evidence bearing on it and issues within incorrectly treated.

Congress was aware of the corner and the abuse of taxpayers by IRS noticing them for doing what had always been allowed and was advised by the experts, and chose its method of rectifying it. Congress acted and the en banc Tax Court hearing in **Miller, Gilbert,** supra adhered to it. "On these fact we are constrained by section 108 to find for petitioner notwithstanding the fact that this result is directly contrary to our holding in **Smith and Fox** . It is not, however, for this Court to question the wisdom of the congressional mandate...

(p846)...and concurring on p850...If the practical effect in honoring the clearly expressed will of Congress is to grant amnesty to pre 1981 commodity tax straddlers, so be it. It is certainly not the proper function of this or any other Court to subvert the will of Congress by substituting the personal preferences of the Judges, and the majority prudently has not done so. "

The tenth circuit two years later overturned Miller Gilbert v Cir 836 f2d 1274 (10th cir 1988). They did that because of tax avoidance motive of taxpayer, not seen here. Or the use of the loss to offset income from other sources, also not see here. Kirchman v Cir 862 f2d 1486 (11th cir 1989). Thus it was proper for the tenth circuit to address the issue herein. They did not properly do a legal analysis as applying

section 108 as used by a dealer, switching out of a month to a later month, because of a corner in the market. We do not concede section 165 recategorization is proper,(as it is only proper where avoidance or abuse is primary motive- not shown here) from the inventory treatment afforded a dealer. But if such analysis were done it would not be disallowed in the year of disposition.

The 9th circuit addressed section 108 in Wehrly v US 808 f2d 1311, 1314, 9th cir. 1986. They found a broad profit motive was all that was needed, and error in the court instruction to the jury, in giving a narrow interpretation. It also was not not claimed to be used to make delivery of metal as the use was herein.

The 3rd circuit addressed the issues of section 108 in Lerman v CIR 939 f2d 44

(3rd cir 1991) where sham transactions were used to offset other income sources, not seen here. However, the court did on pg 53 reach the essence of its reason why Congress enacted section 108 which is the same as that seen here. " Thus section 108 prevents the Commissioner from disallowing loss deductions by pointing to evidence that any one dealer did not have a profit motive on any one trade taken alone". Michelson merely wants treatment in the ordinary course of his business as was afford thousands of other dealers harmed by the silver market.

Judge Parker of the tax court was incensed at the free ride given the commodity dealers, ignored Congress and the tax court precedent. Both are error reversible by this court which should have been done by the reviewing court.

She was part of a strongly worded dissent. She felt that:

..."The real significance of the issue to be decided by the court today can be illustrated by figures contained in the congressional debate; reportedly , notices of deficiency have been issued in 15,000 cases involving tax straddles and deficiencies of $1.5 billion. 11 Cong Rec. s 8390 (daily ed June 27,1984) and 12 Cong. Rec. E3251-E3252 (daily ed July 24, 1984) By the enactment of section 108 of the Tax Reform act of 1984, Congress has clearly indicated that tax relief is to be extended to dealer in tax straddles at a cost of over $300 million in revenue." pg850 **Miller,Gilbert.**

Congress had its eye on values of federal policy which were more important than revenue.

Tax treatment in harmony with this judgment and opinion would have been the ideal resolution herein, combined with what had transpired under **Miller, Gilbert** and Congress' investigation of the corner. Grason Elec. V. Sacramento Muni Utility Dist. 571 f supp 1504 It would protect the government as under tax laws, the government would collect tax on the recovery when is was proven, that there

was a corner. She was required to use the evidence persuasive on the issue and to apply those common facts to the law, to resolve the case. Error in NOT RULING on the mandatory request for judicial notice was made and prejudiced the rights of petitioner in handling the case. Going forward from there, is a record permeated with error and abuse. She further misused procedure in not determining that there in fact were no issue to go to trial on that had not been decisively determined as a matter of law by the Miller, Gilbert v CIR, supra, ruling of the en banc tax court applying the wording of the written statute. She continued to error in disallowing petitioner rulings on his motions properly submitted which went to the experts IRS consulted , and admissions and other pre-trial work. She allowed no

attorney authority to properly process the suit.

She took the clear wording of the statute as regards dealers presumption and trashed it. Her opinion wrongly stated four years after trial was that buying and selling metal on the exchanges is insufficient in itself to qualify as a metal dealer. He must have "some separate trade or business apart from the commodity futures transactions themselves"(pg 29 (568). Michelson had a million dollars in metal inventories and years work with a lot of people in establishing the business correctly. Such was not the law (CEA sec 2,3) or practice per Dr. Teweles interpreting trade practice, in 1979. It was not what Congress intended in its statement to presume dealers and get rid of the pre 1982 cases. It was not what chairman

Rostenkowski as reflective of Congress intended. The usual merchandising function seen of dealers on a board or trade is "risking capital" in "carrying an inventory" which "they sell" from. This merchandising function Congress has so defined in the CEA which she judicially noticed, is what Michelson conformed to.

(3.)IF JUDGE PARKER ERRORS IN UTILIZATION OF ARKANSAS BEST V CIR, (1988) 485 US 212 AS UNDERLYING AUTHORITY FOR THE RULING SHE MADE?

Judge Parker was required to rule by law of the case under **Corn Products v CIR, and Monfort v CIR,** in application of the law to this case looking to tax law, for the year 1979 and 1980 and 1981.

It was error for Judge Parker to hiatus for four year and then misuse a Supreme Court case decided two years

after trial and definitely not then applicable to the case because (1) it was not authority cited by respondent in brief or pre-trial and thus was not law of the case. (2) such an metal inventory case is not addressed within Arkansas Best, it is excluded (3) the bright line of the cases is that the legal instruments in Arkansas Best are securities evidencing ownership of an enterprise, whereas in Michelson the legal instrument was a contract to sell metal for future delivery on a contract market.

Clearly the questions applicable to abuse of "capital gains law" seen in--- Corn Products, inc supra, would not have been seen by the Supreme Court at that time as having any concern because the distinctions had been done away with by Congress in 1986. That leaves it a narrow

question of securities held by banks or other investors who claim various use of them in mergers.

Use of this case law retroactively is a misuse that must be corrected. Having no value because it is not on point it is mute on the question of vittating Corn Products. Arkansas Best is clearly not an overriding Supreme Court decision on hedging, as misapplied to this case. Despite wording excluding inventory applications such as Michelson who had inventories in excess of a million dollars, Judge Parker muddies the water. As she has in her opinion, and IRS counsel has throughout, she side steps the bright line seen in the cases over the years where the instrument being dealt with is "securities" governed under Securities law, and confuses it with those transactions as in Michelson, Corn

Products, and Monfort where the transactions are in contracts for metal or corn or beef. The treatment is consistently different. This same mistake is seen in reliance upon Kemon v. CIR, 16 T.C. 1026 (1951) in her opinion and in trial brief. Clearly proven at trial is the fact Michelson used the contracts to take delivery or make delivery of metal, adding to or selling from his inventory of metal. No more is usually required to be shown.

It is error to ignore petitioner's testimony and documents which show that in all petitioners prior dealings on the exchange he bought metal or he sold metal.(pg25 (564) And that in entering the contract selling gold for delivery in August 1980 he intended to deliver gold from his inventory which contained gold. And for the silver contracts he entered

to deliver silver in 1981 and 82, he intended to deliver silver from inventory when the contracts were due. None of the contract delivery dates came about nor was delivery made because Merrill Lynch acted precipitously closing all his contracts. It is important to known that a corner is a predatory devise used or which results in harming other business, to understand the circumstance Michelson was in here. Merrill Lynch, the only contact with Michelson who could harm him in a corner, was held accountable. Merrill Lynch's version of the situation as "he was speculating and he was committing financial suicide, and they were saving him from himself" was proven wrong in a court of law. In MINPECO v Hunt, et al it was proven the cause was a corner, fraud and racketeering. Merrill Lynch said the same thing about their

customer MINPECO, largest dealer of silver in the world. Judgment is in this record, applicable by collateral estopple and res judicata to Michelson through Michelson's lawsuit. . Absent Merrill Lynch's action harming Michelson there would have been no losses to his business, or Minpeco's.

The opinion and legal conclusions show no consideration given at all to the corner in the silver market which in fact caused the losses to come about. Absent the corner Michelson would have delivered silver in fulfillment of the contracts in 1981 and 1982, as his plan called for. It is error to not see it as a continuum of events rather than a fixed event and ignore the testimonial record in these matter which press firmly on the issues. Michelson undertook a contract to deliver

metal and was interrupted in his endeavors by the corner.

Judge's error on why Michelson's filed schedule c is seen on pg 19 (558) where in a concert to make it appear that Michelson was motivated by consideration of the losses to file schedule c, she states, "After the losses in the commodity futures transactions sustained in 1979 and 1980, petitioner for the first time filed schedule c's with his tax returns." It is misleadingly worded and incorrect as to the cause. If there had been no corner and no silver losses, Michelson would have been required to report on schedule c, the material income of almost $500,000 in March 1979, with profits of almost $200,000. Treatment of his developing business on schedule c after sales started, had been discussed with his accountant in 1978, when

certain transactions were started, and when he finalized the hedging agreement with his bank and Merrill Lynch, and when he bought his metal inventory. As she states it, and because one is mislead to think there is no other business than the losses, and no other transactions than those before the court, it is error. It is totally contradicted in the record.

And in all those 58 other prior contracts he took metal into his inventory. So the implication seen in page 27 (566) that he was a investor because "the transactions in commodity futures in 1979 and 1980 did not differ from petitioner's earlier commodity futures transactions" is in error. To imply that the purpose for those done earlier was investment is contradicted by the facts above and others.The proper implication drawn from the petitioner's

expert accountants testimony, and his own testimony, and the document records is that those earlier transactions were purchases of metal for an inventory of his stock in trade, and the schedule c did not need to be filed until metal sales were made. Thus 1978 was properly filed. The unsupported inference that they show investment is pure rubbish, made up. Even in **Monfort** IRS argues prior dealings treated different. What was necessary to start a sole proprietorship in 1979 was the procedures Michelson undertook. The Court is confused by misapplication of inference to regulation after the years, and hurdles made up after the fact.

Judge Parker refers in the **Michelson** opinion to "securities"(pg 24 (563) showing a lack of soundness in her opinion since nothing in law or evidence

at trial or in the record remotely supports that view. This court must correct clearly erroneous views which bear heavily on the case law and certainly to the functional use. The law clearly defines "securities" different from commodity futures contracts. If one thinks of stock, he thinks of things that have intrinsic value and evidence ownership of an enterprize. One is at limited risk. One does not have to select and grade his metal, insure it, store it or deliver it. He does not have to know purity, form, and weight standards or other specifications showing known by Michelson herein. She is wrong to couple the words "securities" with the words "commodity futures contracts" pg 24(563)& pg31 (570) for her own purpose and the court can correct the error and implication to case law misdrawn. One can

sell a security to anyone. One must perform a contract to deliver metal. Finding Michelson used commodity futures contracts for future delivery of metal from his inventories is proper. Securities has no application. It is paramount to consider the purpose the contracts were entered. It is what should weigh heavily. Judge Parker should not have ignored the testimony to that point and should have admitted the contract cf. Edwards v Cir 415 f2d 578,582 (1969) Two more errors. Investors have theories of investing not shown here to exist. Investors take seriously that stock represents ownership of the enterprize. They are buying an interest in a business, or evaluating its worth.

IRS's counsel in its brief relies on those cases wherein the legal instruments are clearly securities. As such they do

not bear on this case. You cannot hedge metal inventories with a security. You cannot insure a future price for a commodity with a security.

The proper review is one of law. Whether or not the **Arkansas Best** case was overriding Supreme Court doctrine on hedging a metal inventory? Since this was a case of first interpretation of Arkansas Best in the 10th circuit the Court of Appeals was required to analyze the law under a proper standard of review. It should be remanded for that to occur. Or this court should rule that it was a proper inventory situation and no securities were involved, and the return is admittedly correct as filed.

REASONS FOR GRANTING THE REQUEST

(1.) By granting the request for certiorari the court will resolve the conflict between the circuits in interpreting section 108 of the tax reform act of 1984.

(2.)By granting the request for certiorari the court will further the administration of justice in clarifying taxpayers elections and IRS ignoring these.

(3.)By granting the request for certiorari the court will force the circuits to address issues seen in Arkansas Best v CIR in a clear manner for securities and in a clear manner for commodity futures contracts used in hedging as herein.

(4.)By granting the request for certiorari the court will clarify the

role of review to be done by the circuit courts, which was not done herein.

(5.)By granting the request for certiorari the court will clarify abuse of discretion in not rendering judgment within 30 days of trial, an abuse the Court of Appeals should have properly addressed.

(6.)By granting the request for certiorari the court will properly subordinate the tax court to other courts, to the administration of other agencies of specialized import, and to a policy promoting the commerce of the country and consistent tax thereon for all starting a business.

(7.) By granting the request for certiorari the court will further proper tax administration procedures embodied in constitutional principles of due process

and a fair trial. It will assure equality of taxation between big and small business in the same sector of the economy.

(9.)By granting the request for certiorari the court will clarify the role of the expert under the Federal Rules of Evidence as applied to the Tax Court.

(10.)By granting the request for certiorari the court will clarify the role of collateral estopple in proper tax administration, ignored here as irrelevant ruling from another court.

(11.)By granting the request for certiorari the court will show a special concern for the enforcement of Congressional enactment to rein in IRS abuse.

(12.)By granting the request for certiorari the court will allow a small

businessman to continue on in the metal business, make a living, pay taxes and contribute to society. It will weigh the scales of justice correctly to have allowed equal treatment under the law.

CONCLUSION

An error was made in the Court of Appeals in not correcting an injustice. IRS is being abusive in disallowing things to take their normal course. They are not allowing the taxpayer elections he rightfully can make. They ignore industry experts and his testimony. They stonewall the fact that he alone is disallowed certain transactions because he had a prospect of recovery, while no others similarly situated are so treated. It is clear policy to collect all recoveries from the taxpayers when they are received. Then it is certain

treatment of income, not pre-treatment on prospect of income.

Was Michelson hedging? Was he a dealer in metals? It is unlikely an expert of Dr. Teweles experience could be mislead on the subject. He says Michelson was using anticipatory hedging, then the burden shifts to IRS to provide expertise that it was not. They did not do this. And the Judge went astray calling it gambling. It was not gambling. She should have allowed cross examination of the IRS agent. He made no record from which she derived it was gambling for her to have used. Absent proper procedure allowing cross examination of that and expert testimony to counter Michelson's expert in such a acarne business, Michelson must prevail.

Since all using an exchange must adhere to CFTC rules, IRS cannot tax

some on the rules and others not on the rules. If Michelson was hedging according to the CFTC rules, then it is hedging for tax purposes.

Since Congress set the cutoff date of 1982 in statute, great difference must be given it. The tax Court en banc decided that it was a pre 1982 amnesty on straddles and that the year of disposition is when they were closed. It is significant here that Congress chose of all its ways, to say that the transactions "were closed". It knew of the "not closed" treatment of IRS as herein, and clearly intended to work its will. Otherwise there is no reason for legislating that way, since it was industry practice to treat contracts closed when executed.

IRS should have accepted the taxpayers efforts at establishing his

metal business in 1979 within the requirements of the day. $500,000 in metal sales and $200,000 in profits is a good small business. It is a start. The commercial documents are only seen for a dealer. Michelson made contracts to make delivery of metal.

Courts have some latitude in matters of estopple, judicial estopple, and collateral estopple. It would seem that less discretion should be allowed in Tax Court in rejecting the proper application of these principles. Again, taxing is the proper application to givens of the tax rates, and it follows that what is a given from another lawsuit, or another agency or another part of government, must be readily accepted by the Tax Court. There is a need for subordinating them to other courts and for consistent treatment. Judge Parker errored in not

giving effect to the collateral estopple principles applicable from the Judgment of the USDC of NM. While collateral estopple is generally to privies, the modern practice is to grant it very broadly. That would surely bind the IRS or government which is privy to every taxable transaction. She should have taken judicial notice to the fact that Michelson was a metal dealer because he was found to be one in the USDC of NM on similar circumstance and legal documents.

Estopple against the IRS should have been granted because the Department of Labor had investigated and classed him as a metal dealer, and IRS treated him as a business, and admitted in the pleading he was in business.